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IN THE

Supreme Court of the United States

October Term, 1966

No. 251

ISAAC SIMS, JR.,

Petitioner,

—v.—

STATE OF GEORGIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PETITIONER

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PAGE

INDEX

TABLE OF CASES:

STATUTES:

OTHER AUTHORITIES:

BLANK

PAGE

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Opinion Below

The opinion of the Supreme Court of Georgia and the dissenting opinion of Justice Almand are reported at 221 Ga. 190, 144 S.E.2d 103. A prior conviction for the same offense involved here was set aside in an opinion reported as *Sims* v. *Balkcom,* 220 Ga. 7, 136 S.E.2d 766 (1964).

Jurisdiction

Judgment of the Supreme Court of Georgia was entered July 14, 1965 (R. 345) and rehearing was denied July 26, 1965 (R. 351). On October 19, 1965, Mr. Justice Black extended the time for filing the petition for writ of certiorari to and including November 23, 1965 (R. 355). The petition for writ of certiorari and the motion for leave to proceed *in forma pauperis* were filed November 22, 1965, and granted June 20, 1966 (384 U.S. 998; R. 356-57). Re-

view was limited to the first five questions presented by the petition (R. 356-57).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting here, the deprivation of his rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession made under inherently coercive circumstances within the doctrine of *Fikes* v. *Alabama,* 352 U.S. 191.

2. Whether petitioner's Fourteenth Amendment rights were violated by the failure of the Georgia courts to afford a fair and reliable procedure for determining the voluntariness of his alleged coerced confession is disregard of the principle of *Jackson* v. *Denno,* 378 U.S. 368.

3. Whether petitioner's Fourteenth Amendment right to counsel as declared in *Escobedo* v. *Illinois,* 378 U.S. 478, was violated by the use of his confession obtained during police interrogation in the absence of counsel, or whether petitioner's right to counsel was effectively waived.

4. Is a conviction constitutional where:

(a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;

(b) the number of Negroes chosen is only 5% of the jurors but they comprise about 20% of the taxpayers; and

(c) a Negro criminal defendant's offer to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years is disallowed?[1]

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[1] In this brief petitioner will not urge reversal of the decision below upon the ground presented by the fifth question in his petition for certiorari, relating to racially discriminatory application of the death penalty for rape. Petitioner, a pauper, was tried in October, 1964. At that time he had available, to support the contention urged in his plea in abatement (R. 17-18) that Georgia juries discriminate against Negroes in capital sentencing for rape, only the published United States Bureau of Prisons figures showing that between 1930 and 1962 fifty-eight Negroes and three whites were executed for rape in the State. His proffer of this evidence was rejected by the trial judge (R. 93-95)—wrongly we believe—and that ruling was preserved for review by the Georgia Supreme Court (R. 323, 333) and subsequently challenged in the petition for certiorari here.

However, since petitioner's trial, substantial new evidence has become available on the issue. Pursuant to a rigorously conceived research design, an empirical study of the effect of race upon capital sentencing for rape in eleven Southern States including Georgia was undertaken in the summer of 1965 under the sponsorship of the N.A.A.C.P. Legal Defense and Educational Fund. The results of that study are being subjected to statistical analysis on a State-by-State basis and have been proffered or presented through expert testimony in a number of pending cases. See *Maxwell* v. *Bishop*, E.D. Ark., No. PB-66-C-52, decided August 26, 1966, stay granted by Mr. Justice White, September 1, 1966; *Moorer* v. *South Carolina*, 4th Cir., No. 10,526, Memorandum and Order of July 18, 1966 (describing the study). The study lays a firm factual foundation for the attack made in this case, the cases cited, and others, challenging Southern capital punishment for rape under the Equal Protection Clause of the Fourteenth Amendment.

The study to date has involved the expenditure of considerably more than $35,000. Since it supplies evidence supporting petitioner's contention which is vastly more illuminating than the meager showing petitioner attempted to make on the present record in 1964 and—being plainly without petitioner's financial means—obviously will support a "substantial allegation of newly discovered evidence" within the meaning of *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963), it will be available to petitioner in subsequent proceedings, whether on remand following reversal of petitioner's conviction on the grounds urged in this brief or in state or federal collateral attack proceedings. In these circumstances, petitioner's counsel would not urge this Court to premature consideration of a vitally significant constitutional question on the scanty and relatively uninformative record of the present proceeding.

Constitutional and Statutory Provisions Involved

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following Georgia Statutes:

Ga. Code §38-411 (1933):

Confessions must be voluntary.—To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury.

Ga. Code Ann. §59-106 (1965 Rev. Vol.):

Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another

drawn in its stead. (Acts 1878-79, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44; 1953, Nov. Sess., pp. 284, 285; 1955, p. 247.)

Ga. Code §92-6307 (1933):

Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)

Statement of the Case

Petitioner, Isaac Sims, an indigent, ignorant and illiterate Negro, is under a sentence of death by electrocution imposed by the Superior Court of Charlton County, Georgia following his conviction for the crime of rape. His conviction was affirmed on appeal by the Supreme Court of Georgia, which stayed execution pending this Court's review of petitioner's claims that he was denied rights protected by the Constitution of the United States.

Petitioner had previously been indicted, convicted and sentenced to death at the October 1963 Term of the Superior Court for the same offense. That first conviction was set aside on habeas corpus by the Supreme Court of Georgia, which ordered a new trial on May 7, 1964. *Sims* v. *Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964). No appeal from the first conviction had been taken by Sims' court-appointed counsel, the court reporter had destroyed his trial notes, execution had been scheduled for November 13, 1963, and a commutation of sentence had been denied (R. 58, 250-251). One of Sims' present counsel, Mr. Moore, entered the case and initiated the habeas corpus proceedings resulting in

the *Sims* v. *Balkcom* decision and obtained a stay on the day before Sims' scheduled execution.

The indictment leading to this conviction, returned October 6, 1964, charged that Sims raped Nola Jean Roberts on April 13, 1963, in Charlton County (R. 1). The trial commenced the next day, October 7, 1964, and a jury returned a verdict of guilty without recommendation of mercy on October 8, 1964 (R. 2).

The evidence upon which Sims was convicted consisted principally of testimony by the prosecutrix that Sims "forced her car off the road, dragged her into the woods, pulled her clothes off, and raped her" (Opinion below, R. 334), and that he "kept choking her and threatened to kill her if she screamed" (*ibid.*). In addition, there was testimony by Miss Roberts' mother and her physician, Dr. Jackson, as to her condition after the attack, and evidence of several admissions and confessions by the defendant. The circumstances of these admissions and confessions, which Sims contends were involuntary and obtained by coercion, are set forth in detail in Argument I below, pp. 26 to 36. The text of a written confession signed by Sims while in custody appears at R. 226-227. Sims is unable to read or write. The confession was written by a deputy sheriff and read to Sims. The first three sentences and last three paragraphs of the statement were admittedly not statements by Sims but, rather, assertions of the voluntariness of the confession written by the deputy and read to Sims (R. 100-101, 103-104, 218-219).

Petitioner denied understanding the import of the statement and denied his guilt in sworn testimony at a voir dire hearing and in an unsworn statement before the jury (R. 134-135, 248). Sims, in his mid-twenties at the time of arrest, was a pulpwood worker who quit school at age seventeen or eighteen, having completed only the third

grade (R. 128-130). His understanding is severely limited as is illustrated by the following testimony, which is a mere sample of his incapacity as revealed in the record:

Mr. Moore: Do you know what is meant by "the statement can be used against you in court"?

Mr. Sims: Statement can be used against me?

Mr. Moore: Statement can be used against you in court. Do you know what that means?

Mr. Sims: No, sir.

Mr. Moore: Do you know what it means to be informed of your legal rights?

Mr. Sims: Well, that's like being good or something?

Mr. Moore: Is that what it means to you, Isaac?

Mr. Sims: Yes, sir. (R. 136)

* * * * *

Mr. Moore: Isaac, do you know what "Constitutional rights" means?

Mr. Sims: Do you mean good or something?

Mr. Moore: Is that what it means to you, Isaac?

Mr. Sims: Yes, sir. (R. 137)

The facts of record with respect to petitioner's claim of racial discrimination in the jury selection process are set forth below in Argument II, pp. 47 to 48, *infra*.

Petitioner objected to the confessions and the testimony about them on federal constitutional grounds by a series of oral and written motions and pleas, including a pre-trial motion to suppress (R. 13), a motion to quash the signed confession and to exclude the testimony concerning it (R. 235), and motions to strike testimony (R. 212-213, 225). All the motions were overruled. An amended motion for new trial renewed the objections (R. 24-44) and was denied (R. 317). The federal claims were preserved by bill of exceptions (R. 319, 321-322), and on appeal the

Supreme Court of Georgia rejected all of petitioner's constitutional claims and held the confession was properly admitted in evidence (R. 334-343).

Petitioner's objections to the standard used to determine voluntariness under Georgia law were articulated in the amended motion for new trial (R. 43-44). His objections, based on *Jackson* v. *Denno*, 378 U.S. 368, were overruled by the Georgia Supreme Court in an opinion denouncing the holding of *Jackson* as "illogical, impracticable and utterly unsound" and expressing the hope that it would be overruled, while at the same time attempting to show that the *Jackson* holding was not applicable to this case in view of certain Georgia laws (R. 337-342).

The federal objections based on jury discrimination were also preserved throughout the proceedings below. Petitioner's motion for change of venue, first plea in abatement, and challenge to the array in the Superior Court alleged that his Fourth Amendment rights of equal protection of the laws and due process of law had been violated in that grand and petit jury panels were selected in a racially discriminatory manner (R. 3-4, 6-8, 10-11). The pleadings contended that Negroes were systematically and arbitrarily included or excluded from jury panels and that no Negro had ever served as a jury commissioner (*ibid.*). The first plea in abatement and challenge to the array also alleged that the Charlton County Tax Digest from which jurors were selected listed taxpayers separately on the basis of race (R. 4, 7-8). After hearing testimony the court overruled petitioner's objections (R. 5, 6, 8, 12, 70. 93, 95). Petitioner offered in evidence certified copies of the grand and traverse jury lists from 1954 to 1963 (R. 254-98). The trial court ruled them inadmissible (R. 72-73, 147). Petitioner's bill of exceptions in the Supreme Court of Georgia assigned these various rulings on the jury discrimination claim as error (R. 319-322).

The Supreme Court of Georgia affirmed, rejecting petitioner's arguments on the merits (R. 330-332).

Petitioner offered to prove by certified copies of the traverse and grand jury lists of 1954 to 1963 the pattern in which Negroes had been systematically and arbitrarily included or excluded from jury lists (R. 70-73). These offers of proof were ruled inadmissible (R. 147) and this ruling was upheld by the Georgia Supreme Court (R. 332-33).

Summary of Argument

I.

The use at trial of confessions obtained from petitioner while in police custody violated his right against deprivation of life without due process of law, for several reasons.

A. The issue of voluntariness of the confessions was submitted to the trial jury without the prior judicial screening required by *Jackson* v. *Denno*, 378 U.S. 368. The Supreme Court of Georgia conceded as much, but took the view that *Jackson* was inapplicable in Georgia by reason of several aspects of Georgia confession practice—the requirement that confessions be corroborated, the requirement that they be shown voluntary as a condition of admissibility, and the trial court's power to set aside an unjust verdict of conviction—said to provide safeguards not provided by the New York practice condemned in *Jackson*. However, each of these practices has its exact analogue in New York law and each is so obviously general, if not universal, American practice in confession cases that it blinks reality to suppose the Court in *Jackson* imagined that any other practices would obtain in the trials which *Jackson* was plainly designed to govern. Georgia

has here merely evaded, not distinguished, *Jackson;* and its evasion should not be countenanced by the Court.

B. A standard was used to determine the voluntariness, hence the admissibility, of petitioner's confessions which was not the standard imposed by the Fourteenth Amendment. Inquiry respecting voluntariness below was confined to the issues (delimited by Georgia statute) whether petitioner's statements were induced by promises or threats. But under the Due Process Clause, any cumulation of circumstances which saps the will of an accused and compels him to a confession not freely self-determined renders the confession inadmissible even though no threats or promises have been made. The narrow view taken by the Georgia courts of the constitutional obligation of a State to protect criminal defendants against the use of involuntary confessions thus runs afoul of the holding in *Rogers* v. *Richmond,* 365 U.S. 534, and compels reversal of petitioner's conviction.

C. Petitioner, an ignorant and illiterate Negro taken into custody for the capital offense of rape of a white woman, was subjected while surrounded by police to physical brutality requiring hospital treatment. A short time thereafter, still surrounded by police, without the opportunity to see a friend or lawyer, and without effective warning of his rights in view of his limited mentality, he confessed the rape. Later, after he had been charged by warrant, again surrounded by police and without having seen a friend or received effective caution, he was asked to reaffirm his confession and did so. On these uncontested facts, his confessions were coerced as a matter of law. Any confession made in police custody shortly after a prisoner's blood has been spilled is inadmissible consistent with due process of law. When to the physical brutality

suffered by petitioner there is added his mental inadequacy, his isolation in police confinement, and the terrorizing circumstance of his charge for rape of a white woman, the totality of circumstances plainly makes out duress within the prior forced-confession holdings of this Court.

D. The same circumstances firmly establish that petitioner was denied the right to counsel given by *Escobedo* v. *Illinois,* 378 U.S. 478. While petitioner did not request counsel, *Escobedo* and cases decided prior to it make plain that a request is not the invariable condition of the protective right to counsel which *Escobedo* assures, and that in some cases fundamental fairness precludes use of a confession taken from an ignorant and uncounseled state criminal defendant. Petitioner's is such a case. His incapacity to understand or protect his rights in the fearful surroundings of his confinement by the police render the taking of his initial confessions fundamentally unfair. And the police stratagem of securing his reaffirmation after he had been charged violates the command of the Sixth Amendment, as incorporated in the Fourteenth, that a criminal "accused" be provided a lawyer once the proceedings against him have progressed to the post-investigative stage.

II.

A. Georgia courts refused to permit petitioner to make a full record on his claim that Negroes had been arbitrarily barred from and limited in serving on Charlton County grand and petit juries. In thus thwarting petitioner's rights, the Georgia courts were in clear violation of the principle announced in *Coleman* v. *Alabama,* 377 U.S. 129, and *Carter* v. *Texas,* 177 U.S. 442. In jury discrimination cases, this Court has long relied upon records covering a number of years in order to appraise present conduct in the context of past action.

B. The Charlton County jury commissioners' use of segregated tax digests, pursuant to Ga. Code §§59-106 and 92-6307, violates petitioner's Fourteenth Amendment rights to grand and petit juries selected without regard to race. *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E.D. Va. 1964), *aff'd sub nom. Tancil* v. *Woolls,* 379 U.S. 19, deprives the State of any justification for maintaining racially separate tax lists, and Georgia's process of selecting jurors from those lists, together with Charlton County's local practice of having the names of white taxpayers on white paper and Negroes on yellow paper, violates the rule of *Avery* v. *Georgia,* 345 U.S. 559. Ga. Code Ann. §59-106, specifying that jurors shall be chosen on the basis of uprightness and intelligence, requires the jury commissioners to employ vague, subjective criteria and gives them a discretion in which the discriminatory opportunities provided by the segregated digests create an unconstitutional probability of racial exclusion. Cf. *United States* v. *Louisiana,* 225 F. Supp. 353, 396-97, *aff'd,* 380 U.S. 145.

C. Notwithstanding the Georgia courts refused to permit petitioner to make a full record on his jury discrimination claim, the facts shown—that only about 5% of the jury list, from which his grand and petit juries were selected, were identified as Negroes although Negroes comprised about 20% of the tax digest—made out a prima facie case of racial discrimination. In support of this claim, petitioner relies upon statistical computations which show a high degree of improbability that Charlton County juries were selected without regard to race in October, 1964. A gross disparity between the number of Negroes available for jury service and those actually chosen appears, and suffices to make the showing of improbability of color-blind selection required by the jury discrimination cases

generally, e.g., *Smith* v. *Texas,* 311 U.S. 128, 131; *Hill* v. *Texas,* 316 U.S. 400, 404; *Eubanks* v. *Louisiana,* 356 U.S. 584, 587. The instant case is controlled by *Avery* v. *Georgia,* 345 U.S. 559, where the Court, on a record quite similar to petitioner's regarding the jury selection process, held that a prima facie case of racial discrimination had been established. The probability that the selection process was fairly used in *Avery* is much greater than the probability that the process was fairly used in the instant case.

ARGUMENT

I.

Petitioner's Constitutional Rights Were Violated by the Use at His Trial of Confessions Which (A) Were Not Reliably Determined to Be Voluntary, in Violation of *Jackson* v. *Denno,* 378 U.S. 368; (B) Were Judged by Standards of Voluntariness That Were Not in Accord With Constitutional Requirements; (C) Were Obtained in Inherently Coercive Circumstances Following the Physical Brutalization of Petitioner While in Custody; and (D) Were Obtained in Violation of Petitioner's Sixth Amendment Right to the Assistance of Counsel.

Introduction

At petitioner's trial the State introduced testimony concerning an alleged oral confession by petitioner Isaac Sims to Deputy Sheriff Jones (R. 210), and a written confession signed by Sims purporting to give the details of the crime (R. 226-27). Both the alleged oral confession (which Sims denied making) and the signed statement were obtained April 13, 1963, while petitioner was in custody in the Ware County Jail, as the sole suspect in a capital felony. The prosecution also introduced testimony of a

state investigator that on the afternoon of April 15, 1963, he read the written confession to Sims who said it was true (R. 238). Sims stated at trial that he did not understand what he was doing when he signed the confession and that he was innocent of the crime (R. 141, 248).

We urge that Sims' rights under the Constitution were violated by the use against him of these confessions, for several distinct reasons grounded on decisions of this Court decided prior to his trial, October 7, 1964 (R. 148, 249). We submit first, that the procedure by which the trial judge and jury determined the admissibility of petitioner's statements violated the due process requirements of *Jackson* v. *Denno,* 378 U.S. 368. Second, we urge that the standards used to determine voluntariness were constitutionally deficient under *Rogers* v. *Richmond,* 365 U.S. 534, and *Wan* v. *United States,* 266 U.S. 1. Third, we argue that the physical brutality and coercive circumstances surrounding the confessions prohibit their use under *Fikes* v. *Alabama,* 352 U.S. 191, and similar cases. Fourth, we argue that use of the confessions violated petitioner's Sixth Amendment right to counsel under the principle of *Escobedo* v. *Illinois,* 378 U.S. 478, and other decisions of this Court.

A. *The Decision Below Is in Plain Conflict With Jackson v. Denno, 378 U.S. 368*

The decision below is a frontal attack on the fundamental premise of this Court's rulings from *Cohens* v. *Virginia,* 6 Wheat. (19 U.S.) 264, through *Cooper* v. *Aaron,* 358 U.S. 1, to *Henry* v. *City of Rock Hill,* 376 U.S. 776, that under the Supremacy Clause, "the federal judiciary is supreme in the exposition of the law of the Constitution" (*Cooper* v. *Aaron,* 358 U.S. at 18). On June 22, 1964, this Court decided *Jackson* v. *Denno,* 378 U.S. 368, holding

that the Constitution forbids a state court procedure leaving the determination of the voluntariness of a confession to the same jury which is charged with deciding simultaneously the issue of guilt or innocence. The Court held that such a procedure "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect . . . [the] right to be free of a conviction based upon a coerced confession and therefore . . . [violated] the Due Process Clause of the Fourteenth Amendment" (378 U.S. at 377).

Notwithstanding that petitioner was tried and convicted in October 1964, almost four months after *Jackson* v. *Denno,* and that decision was brought to the attention of the Georgia trial and appellate courts, Georgia has adhered to its settled practice in plain violation of *Jackson* v. *Denno.* To be sure, the Georgia Supreme Court's opinion below makes a bow in the direction of the Supremacy Clause ("Did we think that the Jackson case applied to this case, we would unhesitatingly follow it despite our firm conviction that it is illogical, impractical, and utterly unsound"; R. 337), and attempts to distinguish *Jackson* v. *Denno* on grounds we shall examine below. But the primary emphasis of the opinion is an open denunciation of this Court's decision and an express call for it to be overruled.

The court below decried "the unusual implication of Jackson"; deplored the "strange speculation as to how jurors might violate their oaths . . . all of which was pure imagination without a scintilla of fact or law to support it"; asserted it was based on "unfounded speculation"; said the "decision is so shocking . . . every judge has a duty to speak out loudly against it"; and voiced dismay over the "new and strange rule with no basis of law but established by a majority of one of the Supreme Court"

(R. 339-41). Indeed, that court saw the *Jackson* case as one "shaking the foundations of orderly judicial trials which can only be followed by chaos in the trial courts of America" (R. 341), and expresses the hope that this Court will "after more mature consideration overrule *Jackson* v. *Denno*" (R. 341). Such vehemence was not merely academic exhortation. Repudiation of *Jackson* is the only ground on which the procedures employed in petitioner's case could be sustained.

Nothing in the opinion below suggests that Georgia procedure affords what *Jackson* v. *Denno* requires: a system for determining the voluntariness of a confession on the facts and law prior to its submission to the jury which decides the question of guilt or innocence. On the contrary, consistent with prior Georgia precedents, the trial court submitted the issue of voluntariness to the trial jury for decision (see charge to jury at R. 312). The trial jury was left to resolve the conflicting testimony about whether physical brutality was used against petitioner by Dr. Jackson in the presence of a group of police officers at the same time it was considering the issue of guilt on all the evidence, including the disputed confessions. The function of the trial judge, under settled Georgia procedure, was merely to determine whether the State made out a *prima facie* case that a confession was voluntary. The State can establish such a *prima facie* case under Georgia law merely by its witness's assertion during preliminary examination that (in the words of Georgia Code §38-411) a confession was "made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury." *Downs* v. *State*, 208 Ga. 619, 621, 68 S.E. 2d 568, 569-70 (1952); *Garrett* v. *State*, 203 Ga. 756, 762-63, 48 S.E.2d 377, 382 (1948); *Coker* v. *State*, 199 Ga. 20, 23-25, 33 S.E.2d 171, 173-74 (1945); *Bryant* v. *State*, 191 Ga. 686,

710-11, 13 S.E.2d 820, 836-37 (1941). Once the state makes this *"prima facie"* showing it is "for the jury to decide on conflicting evidence whether [a confession] . . . was voluntary." *Downs* v. *State, supra,* 68 S.E.2d at 570. The trial judge overruled Sims' motion to suppress the confession without any explanation or elaboration of his ruling and without any indication that he had attempted to resolve the conflicting testimony presented to him (R. 147). It is significant that during the hearing, out of the presence of the jury, Sims' testimony that he was beaten and pulled by the "privates" while in custody in Dr. Jackson's office was entirely unrebutted, Dr. Jackson's partial denials coming only in testimony to the jury after the confessions ruled admissible.

All of the vices of the procedure which this Court thought sufficient in *Jackson* to require it to overrule *Stein* v. *New York,* 346 U.S. 156, are present here. The trial court's unexplained overruling of petitioner's challenge to the confessions in no way resolved the conflict between petitioner's testimony that he was questioned by Sheriff Lee and Sheriff Lee's denials, nor did it determine whether credence was to be given petitioner's then undisputed testimony that he was beaten by Dr. Jackson in the presence of armed peace officers. The trial court made no findings concerning the weight to be given the testimony that petitioner was "scolded" in the sheriff's office (R. 139), or the circumstances that the written statement contained manufactured statements of voluntariness (R. 101, 103-104). Similarly, it is impossible to know what the jury decided on the question of voluntariness. Here, as in *Jackson* v. *Denno* (*supra,* 378 U.S. 379-80):

> It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any

indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other.

Thus, the ruling below is at war with the requirement that the "procedures must . . . be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Jackson* v. *Denno*, 378 U.S. 368, 391.

The court below does not deny that Georgia practice makes the trial jury the only trier of fact on the issue of "admissibility" when a confession is challenged as involuntary. It, rather, suggests three principal reasons,[2] why it believes *Jackson* v. *Denno* is distinguishable from this case (R. 337-338):

1) That the *Jackson* opinion did not consider Georgia Code §38-420 "which provides that a confession can not rest upon a confession alone, but the confession must be corroborated";

2) that the *Jackson* opinion did not consider Georgia Code §38-411 "requiring as an indispensable foundation to the introduction of an alleged confession a showing that it was freely and voluntarily made and that it was not induced by another by the slightest fear of punishment nor the remotest hope of reward";

[2] The court below also suggested that *Jackson* did not cover this case because "there was no evidence to make an issue of voluntariness" (R. 339). To the contrary, we shall submit at pp. 26 to 43, *infra*, that the uncontradicted evidence establishes coercion as a matter of law. However this may be, the assertion that there was "no evidence" of coercion is entirely untenable. See *ibid.*

3) that the *Jackson* opinion did not consider "Georgia law investing the trial judge with unquestionable power to review the case after conviction, and to set the verdict aside if he is not satisfied with it."

The general answer to these attempted distinctions is that none of the rules of Georgia law which are cited are rules which are different from the New York law considered in *Jackson*. Indeed, all three rules are principles of such general applicability that there is no reason at all to believe that this Court did not consider them or ever thought any other principles applied when it decided *Jackson* v. *Denno, supra.*

The Georgia Supreme Court's first point—emphasizing that confessions must be corroborated—is directly paralleled in New York law. See N.Y. Code Crim. Proc., §395 requiring "additional proof" other than a confession before conviction. The rule that confessions must be corroborated is, of course, universal in American law. See 7 Wigmore, Evidence §2071 (3d ed. 1940). It has been stated frequently in this Court's opinions in federal cases. *Opper* v. *United States,* 348 U.S. 84; *Smith* v. *United States,* 348 U.S. 147; *Wong Sun* v. *United States,* 371 U.S. 471, 488-489. One can hardly suppose that the Court forgot it or did not know of it in deciding *Jackson* v. *Denno, supra.*

Of course, even if the Georgia rule on corroboration of confessions was unique, it would not justify rejection of *Jackson* v. *Denno.* The emphasis on the corroboration of the confession is merely another way of urging that it is reliable or truthful. But *Rogers* v. *Richmond,* 365 U.S. 534, makes it plain that the Constitution requires a determination that a confession is *voluntary* and that the *reliability* of the confession is not properly considered in determining voluntariness.

The Georgia Court's second point merely focuses on the verbiage of Georgia Code §38-411 and is largely rhetoric. Of course, Georgia law requires that a foundation be laid for a confession. But so does New York's law as this Court observed in *Jackson* v. *Denno*, 378 U.S. 368, 377-378, and *Stein* v. *New York*, 346 U.S. 156. The Georgia rule is like the New York rule described in *Jackson* v. *Denno*, 378 U.S. at 377-378:

> Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary. But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge "must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness." Stein v. New York, 346 U.S. 156, 172, 97 L.ed. 1522, 1536, 73 S. Ct. 1077. If an issue of coercion is presented, the judge may not resolve conflicting evidence or arrive at his independent appraisal of the voluntariness of the confession, one way or the other. These matters he must leave to the jury.

And the opinion below nowhere hints at a disavowal of the line of prior Georgia decisions interpreting §38-411 to require only a decision by the judge whether there was a prima facie showing of voluntariness with all factual disputes being left to the jury. *Downs* v. *State*, 208 Ga. 619, 621, 68 S.E.2d 568, 569-570 (1952); *Garrett* v. *State*, 203 Ga. 756, 762-763, 48 S.E.2d 377, 382 (1948); *Coker* v. *State*, 199 Ga. 20, 23-25, 33 S.E.2d 171, 173-174 (1945); *Bryant* v. *State*, 191 Ga. 686, 710-711, 13 S.E.2d 820, 836-837 (1941).

Thus, the court's second point plainly begs the question in its assertion that Georgia law requires that confessions be voluntary. The question decided in *Jackson* v. *Denno, supra,* is *who* must determine that confessions are voluntary. Georgia has not shown that its procedure in this regard differs from that condemned in *Jackson.*

The Georgia court's third point is that the trial judge can grant a new trial if he is not satisfied with or does not approve the verdict. Again, New York has the same rule, and this Court was aware of it as indicated by *Stein* v. *New York,* 346 U.S. 156, 174, footnote 18. This Court described the New York trial judge's powers in *Stein* saying that he can "set aside a verdict if he thinks the evidence does not warrant it," citing N. Y. Code Crim. Proc. §465. Indeed, in a New York capital case such as *Jackson* the state Court of Appeals also has statutory power to order a new trial "if the conviction is found to be 'against the weight of evidence,' or if the court is satisfied for any reason whatever 'that justice requires a new trial'" (*Stein* v. *New York,* 346 U.S. 156, 171-172). See *People* v. *Caruso,* 246 N.Y. 437, 159 N.E. 390 (1927). With respect to the trial judge's powers to order a new trial, the notion that a trial judge may act as a "thirteenth juror" is general in our law and not at all peculiar to Georgia. See, for example, *Brodie* v. *United States,* 295 F.2d 157, 160 (D.C. Cir. 1961); *Davis* v. *State,* 245 Ala. 589, 18 So.2d 282 (1944); *People* v. *Megladdery,* 40 Cal. App. 748, 106 P.2d 84 (1940); *Commonwealth* v. *Coyle,* 190 Pa. Super. 509, 154 A.2d 412 (1959); 24 C.J.S., Criminal Law, §1452 (1961); Barron & Holtzoff, Federal Practice & Procedure, §2281 (Rules ed. 1958).

We submit that the Court should reject the invitation in the opinion below (R. 341) to overrule *Jackson* v. *Denno,* and should reaffirm that the decisions of the nation's highest Court interpreting the Constitution are as binding in

Georgia as they are in the other States. There is no reason why Georgia cannot conform to *Jackson*, as the other States have done.[3] The State's brief in opposition to certiorari in this case has understandably made no argument on the *Jackson* v. *Denno* question.

B. *The Standards Applied Below to Determine Voluntariness Were Insufficient to Satisfy the Constitutional Requirements*

In his Amended Motion for New Trial petitioner set forth constitutional objections to the charge to the jury on the issue of voluntariness (R. 43-44). The charge on this issue (R. 312) did little more than reiterate the language of Ga. Code §38-411 that confessions must be voluntary "without being induced by another, by the slightest hope of benefit or remotest fear of injury." The motion asserted that the charge violated constitutional requirements in that it was "wholly inadequate to have insured a reliable and precise determination of the voluntariness of the alleged confession" and that the "instructions leave it entirely to the impressionistic determination of the jury whether a voluntary confession was in point of fact made without delineating any constitutionally adequate standards or definitive criteria upon which and by which the jury could resolve said issue" (R. 43-44).

Whatever was the scope of the trial judge's function in appraising the issue (we have submitted in part A above

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[3] The following jurisdictions have altered their rules to conform to *Jackson* v. *Denno*, 378 U.S. 368: *State* v. *Costello*, 97 Ariz. 220, 399 P.2d 119 (1965); *People* v. *Walker*, 374 Mich. 331, 132 N.W.2d 87 (1965); *State* v. *Brewton*, 395 P.2d 874 (Ore. 1964); *Commonwealth ex rel. Gaito* v. *Maroney*, 416 Pa. 199, 204 A.2d 758 (1964); *Lopez* v. *State*, 384 S.W.2d 345 (Tex. Ct. Crim. App. 1964), on remand from 378 U.S. 567; *State* v. *Burke*, 27 Wis. 244, 133 N.W.2d 753 (1965).

State law grounds barred consideration of *Jackson* on its merits in *State* v. *Taylor*, 133 N.W.2d 828 (Minn. 1965); *Marion* v. *State*, 387 S.W. 2d 56 (Tex. Ct. Crim. App. 1964).

that he did not resolve any disputed facts), it seems apparent that he did not use any different standard than the one he gave the jury. This is clear not only from the jury instruction but from the manner in which the Court repeatedly treated objections to the confessions, permitting them to go before the jury on nothing more than conclusory affirmative answers by police witnesses to questions phrased in the words of the statute (R. 211, 224-225).

Finally, the Georgia Supreme Court seems to have taken the same narrow view of the test for vountariness. Its opinion gives little evidence of an examination of the totality of the circumstances surrounding the confession. There is, for example, no mention of the physical brutality to which Sims was subjected while in custody during the investigation process. This is described in detail, *infra* at pp. 26 to 30. Nor was there any discussion of the many other factors such as Sims' mental condition, injuries, education, isolation, etc., which are delineated below at pp. 30 to 36. Rather, the court below apparently found it sufficient to resolve the issue that there was testimony that petitioner was advised of certain rights; that the Sheriff testified "that no threats or promise of hope or benefit or reward were made to induce Sims to make a statement" (R. 335); that there was thus, a "prima facie showing that the statement was freely and voluntarily made and admissible in evidence. Code §38-411" (R. 336); and that "even without this confession, the above-mentioned evidence was sufficient to support the verdict" (R. 334).

It is, we submit, clear that petitioner never had a decision of the issue of voluntariness made with reference to the appropriate constitutional standards at any level—neither by the trial judge, jury, or state appellate court. His conviction should be reversed on the authority of *Rogers* v. *Richmond*, 365 U.S. 534.

In *Rogers, supra,* the Court invalidated a conviction resting on a confession which the trial judge and the State's highest court had approved, since it was plain they both "failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession" (365 U.S. at 540). The error of the Connecticut courts was in determining admissibility "by reference to a legal standard which took into account the circumstance of probable truth or falsity" (365 U.S. at 543).

In Isaac Sims' case, it is apparent that the State's highest court made the same error. It relied on the fact that there was other evidence corroborating the confession in considering its admissibility. Whether the other evidence of guilt was thought pertinent as assuring the confession's truth or as warranting its non-prejudicial character, this simply is not Fourteenth Amendment law. See *Payne* v. *Arkansas,* 356 U.S. 560, and authorities cited.

The Supreme Court of Georgia, moreover (and the trial court insofar as its basis of judgment can be gleaned from this record), appraised the case only in terms of the presence or absence of threats or promises—the Georgia statutory standard. Similarly, the skeletal instructions to the jurors in the words of the statute directed the jury's attention to "hope . . . or . . . fear" and wholly failed to equip the jurors to determine voluntariness in accord with federal constitutional standards requiring scrutiny of all the coercive or overbearing circumstances of the case.

This Court long ago condemned as unduly restrictive a review of confessions that was limited to determining whether they were induced by promises or threats. Mr. Justice Brandeis wrote in *Wan* v. *United States,* 266 U.S. 1, 14-15:

> The court of appeals appears to have held the prisoner's statements admissible on the ground that a confession made by one competent to act is to be deemed voluntary, as a matter of law, if it was not induced by a promise or a threat; and that here there was evidence sufficient to justify a finding of fact that these statements were not so induced. In the Federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. Bram v. United States, 168 U.S. 532.

And at least since *Chambers* v. *Florida,* 309 U.S. 227, 239, the rule of *Wan* has been the law of the Fourteenth Amendment. See also *Ward* v. *Texas,* 316 U.S. 547, 555; *Ashcraft* v. *Tennessee,* 322 U.S. 143, 154.

Petitioner has not had a determination of voluntariness in the courts below which is consistent with the constitutional standards. *Rogers* v. *Richmond,* 365 U.S. 534; *Wan* v. *United States,* 266 U.S. 1; cf. *Haynes* v. *Washington,* 373 U.S. 503, 516-517, note 11.

C. *Petitioner's Confession Was Obtained in Inherently Coercive Circumstances and After He Had Been Physically Brutalized While in Custody, and Its Use to Convict Him Violates the Due Process Clause of the Fourteenth Amendment*

1. Facts and Circumstances Surrounding the Confession

Isaac Sims was taken into custody by Sgt. George Sims and Trooper Peacock of the State Patrol at about 3:00 p.m. on April 13, 1963 (R. 184-185). On orders from Sheriff Sikes, petitioner was taken by Sgt. Sims to the medical office of Dr. Joseph M. Jackson (R. 185). He was taken directly to Dr. Jackson's office from the place where the police took him in custody (R. 184-185). It is clear that the officers took Sims to Dr. Jackson's office as a part of their investigative process, so that his clothes might be removed and examined for evidence of the crime (R. 205, 206-207).

Petitioner Sims testified very clearly that he was brutalized while in custody at Dr. Jackson's office. He gave such testimony both in the pre-trial hearing outside the presence of the jury (R. 131), and in his unsworn statement, before the jury (R. 248). Sims stated that he was in Dr. Jackson's office with seven or eight white state patrolmen. When asked what happened to him there, Sims said (R. 131):

> Well, Dr. Jackson, he knocked me down and kicked me over my eye lid and busted my eye on the right side.
>
> Q. Did anything else happen to you? A. And he grabbed me by my private and drug me on the floor.

Sims' statement before the jury was to the same effect (R. 248):

Well, they brought me over to Dr. Jackson's office and they carried me in there, about six or seven State Patrols, and Dr. Jackson beat me, and taken my clothes off, and then carried me over to the bigger hospital and stitched my eye up where they kicked me over the eye, and put me on some white clothes —white pants, but I kept my shirt I had on.

Q. While you were in Dr. Jackson's office did he drag you around the floor? A. Yes, sir.

* * * * *

Q. (By the Defendant's Attorney) What happened to you while you were in Dr. Jackson's office? A. Well, he pulled me by the privates.

When Sims testified in the pre-trial hearing he was cross-examined, but *the prosecutor never asked Sims a single question about what happened to him in Dr. Jackson's office* (R. 137-143). In addition, *the prosecutor put on no testimony at all to rebut Sims' claim* that he was beaten, kicked over the eye, and pulled by his private parts in the presence of six to eight officers.

The prosecutor never asked any witness a single question about what happened in Dr. Jackson's office. Sgt. George Sims, the officer who took petitioner to and from Dr. Jackson's office (R. 185), was never asked what happened in the office.[4] The other officers who were present were never called to testify or identified by name.[5] The prosecutor did not ask Dr. Jackson a single question (on direct or re-direct) about what happened while Sims was in his office (R. 189-197, 208).

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[4] Dr. Jackson said that he presumed that the officers in the office with Sims were the ones who brought him there (R. 202).

[5] The exception was Trooper Peacock who was mentioned by Sgt. Sims (R. 184) but did not testify.

Defense counsel did cross-examine Dr. Jackson about the events in his office (R. 202-207). Certain aspects of Sims' testimony were confirmed by Dr. Jackson, who said:

(a) that Sims was brought to his office (R. 202);

(b) that police officers and troopers were there and he was not alone with the defendant (R. 202);

(c) that Sims' clothes were removed (R. 202);

(d) that he (Dr. Jackson) "assisted him slightly" and gave him "a little help" in removing his clothes, including his pants and his underpants (R. 202-203, 206-207);

(e) that Sims was down on the floor while in the office (R. 203, 204);

(f) that by the time Sims left the office he "had a place over his eye that required some treatment" (R. 204);[6]

(g) that when Sims left "he was taken over to the hospital and the place was treated that I told you about" (R. 207);

(h) that at the hospital Dr. Aztui put four stitches in the injury over Sims' eye (R. 207).

Dr. Jackson's explanation of what happened to petitioner in his office was highly evasive and partly in the form of denials of knowledge about what happened to Sims. Asked whether the State Patrolman "put the place over his eye," Jackson answered, "I don't know who put it there" (R. 204). When asked if the officers were beating Sims he said:

A. You'll have to ask the officers.

Q. I'm asking you, Dr. Jackson. I'm asking you

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[6] A state investigator observed the injury on his face two days later (R. 242).

whether or not the officers were beating the defendant. A. I will say that I wasn't there all the time (R. 204).

Referring to the "place" over Sims' eye, Jackson was asked:

> Q. He didn't have it over his eye when he came into your office, did he? A. I didn't see him till after he got in.
>
> Q. And when you first saw him in your office he didn't have it? A. I couldn't see it. He was sort of slumped over, sort of falling around, like. Most anything could have happened to him (R. 204).

Dr. Jackson denied that he knocked Sims down (R. 204) or that he kicked him (R. 205). But when asked whether Sims was kicked he said only: "I don't know that he was" (R. 205). Earlier, Dr. Jackson was asked whether Sims was knocked down and he said: "I don't know whether he was knocked down or fell down" (R. 203).

Dr. Jackson was asked:

> Q. Did you find him down on the floor? A. He sort of fell in the floor.
>
> Q. He just sort of fell? Where were you standing at the time he sort of fell? A. I was standing on my feet.
>
> Q. Were you standing near him? A. Fairly close.
>
> Q. Were you standing as close as I am to you, or closer? A. Probably a little closer.
>
> Q. Where you could touch him? A. I think he could touch me.
>
> Q. And you could touch him? Right? A. Yes. (R. 204).

Thus, Dr. Jackson's testimony was that Sims was close enough to touch him when he fell on the floor, but Dr. Jackson did not know "whether he was knocked down or fell down" (R. 203). Later Jackson said Sims was on the floor when he entered the room (R. 205). In Jackson's own words, "Most anything could have happened to him" (R. 204). Despite all this, throughout the entire trial the prosecutor avoided any inquiry into what happened to Sims in Dr. Jackson's office. Although Dr. Jackson denied on cross that he knocked Sims down or kicked him, the prosecution asked no questions about this and called none of the policemen to corroborate the doctor's denial. Plainly Sims was injured while in custody. There was no suggestion that he resisted arrest or anything of that nature.

Moreover, *the doctor gave no testimony denying Sims' claim that he was pulled by his private parts and dragged on the floor.* There was no rebuttal or denial of this testimony at all and it stands uncontradicted and uncontested in the record. The language of the Court in *Haynes* v. *Washington,* 373 U.S. 503, is pertinent in appraising the State's failure to rebut Sims' claim of brutality:

> We cannot but attribute significance to the failure of the State, after listening to the petitioner's direct and explicit testimony, to attempt to contradict that crucial evidence; this testimonial void is the more meaningful in light of the availability and willing cooperation of the policemen who, if honestly able to do so, could have readily denied the defendant's claims. (373 U.S. at 510.)

In addition to the evidence of physical brutality, there are, of course, a variety of other facts to be considered in appraising the totality of circumstances surrounding the confessions. They reveal that Sims was bewildered, help-

less, alone, hungry, in pain and in fear when he signed his written statement.

Isaac Sims is an indigent, ignorant, illiterate Negro, who cannot read and can write only his name (R. 130). He has spent most of his life in Charlton County in the southeast part of Georgia (R. 129). Both of his parents are dead; his closest relatives in Charlton County were two sisters (R. 128). At the time of his arrest he was in his twenties; the record leaves his exact age unclear.[7] Sims was unable to tell what year he was born (R. 128). He went to the third grade in school, quitting when he was "seventeen or eighteen" (R. 130). He testified, "Well, I didn't go [to school] too much on account of I had to help my father work, and he taken me out of school" (R. 129). He worked as a pulpwood worker, earning forty to sixty dollars a week. He is indigent, had appointed counsel at his first trial, and has proceeded in forma pauperis throughout the case.

The record reveals his limited mental capacity in many instances. He did not know the year he was born; nor could he state when his father died (R. 128). He was totally unable to explain words and phrases such as "normal and ordinary" (R. 144), "legal rights" (R. 136), "constitutional rights" (R. 137), "freely and voluntarily" (R. 136), "the right to have a lawyer" (R. 137), or that "a statement can be used against you in court" (R. 136). Sims "stutters" when he speaks (R. 122).

Sims was a Negro charged with the rape of a white woman—a capital felony in Georgia. The prosecutrix was the unmarried daughter of the local postmaster (R. 61). At about 2:00 or 2:30 p.m. Sims was taken into custody and held at gunpoint some five miles from the scene of the

[7] The confession stated that he was 27 on the day of arrest in April 1963 (R. 226); he testified that he was 29 at the trial in October 1964 (R. 247), but his birthdate was February 5 (R. 128).

crime by two Negro men who had been ordered by their boss, a local white man, to look for any "stray man" (R. 169, 175-176). He was then taken by this white man, Noah Stokes, accompanied by several other men, to state troopers who carried him to Dr. Jackson's office where Sims was brutalized as we have described above. After Sims was treated at the hospital for his eye injury, the police took him to the Ware County Jail in Waycross, some thirty or thirty-five miles away from Folkston and located outside the county where the crime occurred, for "safe keeping" (R. 233-234, 242).

The police testimony is that at about 6:30 p.m., while confined in a cell at the Ware County Jail, Sims orally admitted "raping" or "molesting" a white woman in Folkston in a conversation with Deputy Sheriff Dudley Jones whom Sims had known for more than a dozen years previously[8] (R. 113, 209-210, 214-216). Jones did not testify that he gave Sims any warnings prior to eliciting this admission, either as to Sims' right to remain silent, that his statement would be used against him, or as to his right to counsel. Jones testified that Sims then agreed when asked if he wanted to make a statement to the sheriff (R. 113, 210).[9]

Sims remained alone in a cell until about 10:00 or 10:30 that evening when he was taken to the "interview room" in the jail (R. 210, 223). Sims had not been fed since he was taken into custody some 8 hours earlier and he was still in pain from the injury sustained in Dr. Jackson's office.[10] There were four white officers in the "interview

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[8] Sims denied making this oral confession (R. 134, 138-139).

[9] Sims also denied this (R. 133).

[10] Sims testified at R. 135-136:

A. Well, I felt pretty rough for about two or three weeks, more on my private than I did on my face.

Q. When you said you felt pretty rough, what did you mean, Isaac?

A. Well, I was paining a right smart.

room" with Sims: they were the Sheriff and Deputy Sheriff of Ware County, the Chief of Police, and the Constable.[11] Sims testified that he was "scared" (R. 143). As to his treatment, he said, "they didn't beat me, but they kind of scolded me a little" (R. 139). None of Sims' testimony in these regards was rebutted.

Since his arrest, petitioner had not been in touch with any relative, friend or attorney. He had not been offered the use of a phone (R. 222) and he had not been taken before a magistrate in accordance with Georgia law (R. 235-236).[12] He was in jail in the adjoining county some 30 or 35 miles from Folkston (R. 67, 242).

Q. Were you paining a right smart when you were in the room with Sheriff Lee and Deputy Sheriff Jones? A. Yes, sir.

Q. Now, after you were taken into custody up until the time you were taken upstairs had you been given anything to eat? A. No, sir.

Q. Were you hungry? A. Yes, sir; I could have eat.

[11] The Police Chief and Constable were not called as witnesses.

[12] Georgia law specifically required bringing petitioner promptly before a magistrate where, as here, the arrest was made without a warrant:

"*Duty of person arresting without warrant.*—In every case of an arrest without a warrant the person arresting shall without delay convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose and any person who is not conveyed before such officer within 48 hours shall be released." Ga. Code §27-212 (1933).

Even if the arresting officers had a warrant, they were similarly obligated:

"*Officer may make arrest in any county. Duty to carry prisoner to county in which offense committed.*—An arresting officer may arrest any person charged with crime, under a warrant issued by a judicial officer, in any county, without regard to the residence of said arresting officer; and it is his duty to carry the accused, with the warrant under which he was arrested, to the county in which the offense is alleged to have been committed, for examination before any judicial officer of that county.

"The county where the alleged offense is committed shall pay the expenses of the arresting officer in carrying the prisoner to that county; and the officer may hold or imprison the defendant long enough to enable him to get ready to carry the prisoner off. (Acts 1865-6, pp. 38, 39; 1895, p. 34.)" Ga. Code §27-209 (1933).

The record does not make it clear how long Sims was in the interview room before the confession was given and signed,[13] or to what extent, if any, Sims was interrogated. When asked whether he questioned Sims, Sheriff Lee said, "I don't think so," then, "I could have," and finally, "I just don't recall right now" (R. 105). Sims said he was questioned by Lee (R. 135, 140), and also that he was "scolded" (R. 139).

Deputy Sheriff Jones wrote out the confession and read it to Sims. He admittedly wrote out some matter which Sims did not say. The Sheriff, and his deputy who actually wrote the confession, testified petitioner did not say that the statement had been made freely and voluntarily or that he had been informed of his legal rights, although the written statement includes those words. In fact, petitioner does not even know the meaning of "freely and voluntarily" (R. 136). Every word in the confession asserting its voluntariness and its having been made with knowledge of the legal consequences was inserted not by petitioner but by his inquisitors. The deputy sheriff crossed out several words in the original statement, including the words, "I

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[13] Sheriff Lee testified (R. 104):

Q. Do you know what time on the evening of April 13, 1963, that you started taking this statement? A. Well, the statement was short. It wouldn't have taken but just a few minutes.

Q. How many minutes? A. Oh, ten or fifteen minutes.

Q. Did you start taking the statement at 10:30 or did you conclude it at 10:30? A. Well, I wouldn't say we finished at 10:30 or started at 10:30. It was approximately 10.

Q. So you questioned him from 10 to 10:30? A. How is that?

Q. You questioned him from 10 to 10:30? A. I didn't say that.

Q. You started at 10? A. I didn't say that.

Q. You started at 10:30, then? A. I said that we could have finished at 10:30 or started at 10:30. I don't recall.

Deputy Sheriff Jones said that Sims was brought down at 10:30 (R. 113); that it took him approximately twenty to thirty minutes to write down Sims' statement (R. 119), and five or six minutes to read it to him (R. 121-122).

have read" when it was learned the petitioner could not read (R. 229).

The sheriff testified that he told petitioner that before he made a statement he was entitled to an attorney and that petitioner said he did not want one (R. 99-100, 224). The sheriff also said that he told petitioner "that the statement he was going to give could be used against him in court" (R. 99-100, 225). On each of the occasions at trial when Sheriff Lee recounted his warning to Sims, he failed to mention that he advised Sims of his right to remain silent (R. 99-100, 224-225). However, a sentence at the end of the confession written by the deputy recites: "I have been informed of my legal rights by Sheriff Robert E. Lee that I did not have to make any statement whatsoever, knowing that this statement can be used against me in a court of law" (R. 227). No one offered Sims the use of a phone or advised him that a lawyer would be appointed if he could not afford one.

On Monday afternoon, April 15, 1963, Agent F. F. Cornelius of the Georgia Bureau of Investigation brought Sims in handcuffs from the jail in Waycross back to the sheriff's office Folkston (R. 237, 241). Cornelius questioned Sims in the sheriff's office in the presence of five other police officers[14] (R. 239-240). Cornelius read the statement Sims had signed on Saturday night to Sims, asked him if it was true, and Sims said, "Yes, sir" (R. 238). Cornelius did not caution Sims that he was not required to answer and could remain silent, or otherwise advise him of his rights (R. 241). Sims apparently still had no attorney and had not seen any friends or relatives during the period since his arrest (R. 241-242). He was first taken before a magistrate on April 15th (R. 66). The record is silent on whether the question-

[14] None of these five officers testified at the trial.

ing by Cornelius came before or after that proceeding. But a warrant charging Sims with the crime had been issued at some time before he was brought back to Folkston and made the admissions to Cornelius (R. 239).

2. The Confessions Were Obtained in Inherently Coercive Circumstances and Their Use Violated the Due Process Clause

The Court has consistently held that the voluntariness of a confession must be determined in the context of all the surrounding circumstances as they appear from the Court's independent examination of the uncontested facts on the entire record. Examination of the record in this case makes it plain that each of the confessions allegedly given by Sims to the law authorities while he was in custody were given in inherently coercive circumstances and were not voluntary.

The recitation of the facts above should demonstrate conclusively that *Fikes* v. *Alabama,* 352 U.S. 191, requires reversal of the conviction. The similarities between this case and *Fikes* are numerous and significant. In both cases the petitioner was a Negro in his mid-twenties charged with a sexual assault upon the daughter of a local public official in a southern community. Both Fikes and Sims had attained only third grade educations when they quit school in their late teens. Sims, like Fikes, is of limited mentality. In this case, as in *Fikes,* the petitioner was first arrested by civilians; was not arraigned or taken before a magistrate prior to his confession; was carried to a jail far from the scene of the crime; and was allegedly advised of some of his legal rights by a law enforcement officer before confessing. Sims saw no friend, relative or counsel; Fikes saw his employer, but his father and a lawyer were denied access to him. The *Fikes* record contained "no evidence of physical brutality" (357 U.S. at 197). But Isaac Sims made a strong and largely uncontested showing that he was

brutalized and suffered injury requiring medical treatment while in the custody of officers who were engaged in an investigative process.

The *Fikes* case involved a longer period of custody and questioning before the confession, viz., five days in *Fikes* as against 7 or 8 hours in this case. But even a short period of time may be sufficient to overpower a suspect's will (*Haley* v. *Ohio,* 332 U.S. 596), and the denial of food to petitioner during his confinement bears directly upon the confession's alleged voluntariness (*Watts* v. *Indiana,* 338 U.S. 49, 53; *Payne* v. *Arkansas,* 356 U.S. 560, 567), as does the stripping of petitioner in Dr. Jackson's office (*Malinski* v. *New York,* 324 U.S. 401). The physical beating suffered by Sims is sufficient to counterbalance the comparatively short period of questioning revealed by the record. As Mr. Justice Frankfurter (joined by Mr. Justice Brennan) said concurring in *Fikes* v. *Alabama,* 352 U.S. 191, 198:

> It is, I assume, common ground that if this record had disclosed an admission by the police of one truncheon blow on the head of petitioner a confession following such a blow would be inadmissible because of the Due Process Clause.

Sims has more than met the requirement that he show "one blow." It is not disputed that while engaged in their investigation the police took Sims to Dr. Jackson's office where he sustained injuries requiring medical treatment (four stitches over the eye), which he claimed were received from blows and kicks in the presence of the police, an episode the prosecution has never troubled to deny or rebut. We submit that it is plain that the prosecutor never asked a question or put on a witness to deny Sims' version of this incident because he could not honestly do so (cf. *Haynes* v. *Washington,* 373 U.S. 503, 510).

The element of violence in this case makes it as strong, if not stronger than *Fikes, supra,* and similar cases where the Court has viewed the circumstances as sufficiently coercive to strike down convictions. See, particularly, *Haynes* v. *Washington,* 373 U.S. 503; *Culombe* v. *Connecticut,* 367 U.S. 568; *Turner* v. *Pennsylvania,* 338 U.S. 62; *Johnson* v. *Pennsylvania,* 340 U.S. 881 (*per curiam;* facts stated in *Culombe* v. *Connecticut,* 367 U.S. 568, 628).

And, of course, the fact that Sims' signed statement contains assertions of voluntariness, composed by the police, does not suffice to save the confession in view of the other circumstances. A strikingly similar recital also dictated by the police was disregarded by the Court in striking down the conviction in *Haley* v. *Ohio,* 332 U.S. 596, 598, 601. Sims' testimony indicates he did not even comprehend the meaning of the recitals of voluntariness or understand the significance of the warnings he was given. His supposed waiver of the right to counsel could not, given his lack of understanding and inability to understand common legal terms expressed in ordinary language, be regarded as "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U.S. 458, 464. Plainly, petitioner did not know a lawyer's function or understand how a lawyer could be of assistance to him.

Here, as in *Fikes,* "The totality of the circumstances that preceded the confessions . . . goes beyond the allowable limits" (352 U.S. at 197). The conclusion applies equally to the alleged oral admission to Deputy Jones, the signed statement, and the testimony that the signed statement was reaffirmed two days later.

3. The Physical Violence Inflicted on *Sims* Is Sufficient by Itself to Invalidate the Confessions

We submit that the physical violence inflicted on Sims while in custody, during a police effort to find evidence of the crime by examination of his clothes, is alone sufficient to vitiate the confessions obtained thereafter. It is conceded that he was stripped of his pants and underpants in a room full of men. No witness has denied his story that he was pulled by his private parts and dragged across the floor. His version was not even challenged by cross-examination. It is conceded that he sustained injuries requiring medical treatment while in a room containing a doctor and policemen. No one told any story about how Sims received his injuries except Sims. Dr. Jackson's evasions are plain on the record; he offered no explanation of Sims' injury.

In *Payton* v. *United States*, 222 F.2d 794, 796-97 (D.C. Cir. 1955), a confession was obtained while an accused had blood on his shirt, having been recently bleeding as the result of force reasonably used by the officers to effect his arrest and confinement. The Court excluded a confession and reversed a conviction on the ground that admission of a confession following so shortly after violence upon the prisoner—albeit reasonably necessary violence—was improper. Judge Fahy wrote for the Court (at 797):

> We assume the officers had authority to use the force reasonably necessary to effect the arrest and confinement. But when a confession is elicited so soon after the use of violence upon the prisoner, resulting in bloodshed, the compelling inference is that the confession is not the free act of the prisoner. It is immaterial that other coercion did not occur at the very moments he was questioned and signed the statement. Violence at the hands of the Police admittedly had oc-

curred within about an hour. A confession made in such circumstances, and thereafter repudiated by the accused, should not be admitted in a criminal trial in a Federal court. "The undisputed facts showed that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass." Ziang Sung Wan v. United States, 266 U.S. 1, 16-17; . . . [other citations omitted].

Judge Fahy quotes (222 F.2d at 797, note 5), from the opinion in *Stein* v. *New York*, 346 U.S. 156, 182, as follows:

"Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim."

The *Stein* opinion further states in language that is relevant here:

Slight evidence, even interested testimony, that it [defendant's injury] *occurred during the period of detention* or at the hands of the police, *or failure by the prosecution to meet the charge* with all reasonably available evidence, might well have tipped the scales of decision below. Even here, it would have force if there were any evidence whatever to connect the admitted injuries with the events or period of interrogation. But there is no such word in the record. (346 U.S. at 183, emphasis added.)

As we have seen, there is ample evidence to show that Sims' injury occurred during detention and the prosecu-

tion has made no effort to meet the charge with any evidence. Nor can it matter that the same officers who later obtained Sims' confessions were not shown to have been present when he was mistreated. There was no showing that the coercive impact of his mistreatment during the investigative process (in the presence of seven or eight officers by Sims' account) was at all eliminated by his being transported thirty or more miles to another county and turned over to other officials. Sims testified as to his continuing pain for a prolonged period far beyond the last of the confessions. The oral admission to Deputy Jones was said to have occurred at about 6:30, less than three hours after Sims was injured. The written statement followed a few hours later after a period of isolated confinement. The final admission of the accuracy of the signed statement to state investigator Cornelius must obviously fall if the statement itself is excluded. It is clearly tied to the written statement. In any event, it occurred after petitioner had been returned to Folkston, the scene of his original beating and again in a room with six policemen.

If the confession involved here had been introduced at a trial held after June 13, 1966, the conviction would plainly be summarily reversed on the authority of *Miranda* v. *Arizona,* 384 U.S. 436; *Johnson* v. *New Jersey,* 384 U.S. 719; cf. *Davis* v. *North Carolina,* 384 U.S. 737, 739. The courts below did not have the benefit of the specific guidelines set forth in *Miranda,* and concededly the full panoply of protections given by that decision are not available to Sims. But in an important sense *Miranda*—apart from its specific guidelines—represents a distillation of the lessons learned through the long experience of this Court in the review of in-custody confession cases. It plainly reflects sensitive awareness of a problem the Court has recognized before, namely, that:

> What actually happens to them [prisoners] behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. (*Culombe* v. *Connecticut*, 367 U.S. 568, 573-574, opinion of Justice Frankfurter, joined by Justice Stewart.)

We urge that in light of this consideration, the Court now firmly declare that any in-custody confession which follows close upon the spilling of the prisoner's blood while he is alone in the hands of officers (*Payton* v. *United States, supra*)—a confession following a blow (*Fikes, supra*, Justice Frankfurter, concurring) or unexplained evidence of injury to a prisoner during detention (*Stein, supra*)—must be excluded without further inquiry whether the prisoner's will was overborne by the brutality.

We recognize that this rule has not been uniformly followed in the past and that confessions have been sustained notwithstanding physical violence as in *Lisenba* v. *California*, 314 U.S. 219. But we urge such a general principle as consistent with the spirit and learning of *Miranda* v. *Arizona*, 384 U.S. 436. *Lisenba* dates from an era when this Court's concern in state criminal cases was with the performance of the state courts, not the police. Long before *Miranda*, that concern had broadened. See *Blackburn* v. *Alabama*, 361 U.S. 199; *Spano* v. *New York*, 360 U.S. 315. There can be no justification for police brutality upon a prisoner, and no legitimate police interest in beatings. There will be explanations offered, of course (although not even those were offered here), and speculation that the prisoner was hard-headed and remained unaffected. *Miranda* counsels that no ear be given to these unlitigable

matters. Where blood has flowed, no confession made soon after should be tolerated consistent with due process of law.

Even in the absence of such a general principle, however, the violence upon Sims must vitiate his conviction when considered in conjunction with his limited mentality and general helplessness in the hands of experienced investigators. Plainly Sims had no:

> . . . powers of resistance comparable to those which the Court found possessed by the defendant Cooper in Stein v. New York, 346 U.S. 156, who haggled for terms with the officials to whom he confessed, or the defendant James in Lisenba v. California, 314 U.S. 219, who bragged immediately before his confession that there were not enough men in the District Attorney's office to make him talk. (*Culombe* v. *Connecticut*, 367 U.S. 568, 625, opinion of Justice Frankfurter, joined by Justice Stewart.)

Extraction of confessions from Sims, in his circumstances, and their use to convict him violated the Due Process Clause.[15]

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[15] The assertion of the court below that the conviction may be justified because "even without this confession, the . . . evidence was sufficient to support the verdict" (R. 334) deserves only brief reply. First, it should be mentioned that the sole significant corroboration of the prosecutrix's testimony was the confession. Georgia law and the trial court's charge below required "other evidence independent of hers, sufficient to connect the accused with the offense charged" (R. 313) to corroborate her testimony. Literally nothing in the record except the confessions connect Sims with the offense. Furthermore, the victim never identified Sims as her attacker until his first trial some 5 months after the crime (R. 157-158). Second, and more fundamentally, the voluntariness of a confession must be examined without regard to the other evidence of guilt, and a defendant's constitutional rights are violated by use of a coerced confession to convict, even if there is other convincing evidence of guilt. *Rogers* v. *Richmond*, 365 U.S. 534, 544; *Malinski* v. *New York*, 324 U.S. 401, 404; *Bram* v. *United States*, 168 U.S. 532, 540-542; *Payne* v. *Arkansas*, 356 U.S. 560.

D. *The Decision Below Violates Petitioner's Sixth Amendment Right to Counsel in Conflict With Escobedo v. Illinois, 378 U.S. 478, and Other Decisions of This Court*

Petitioner's trial commenced some four months after the decision in *Escobedo* v. *Illinois,* 378 U.S. 478; thus that decision may be applied in judging his case. *Johnson* v. *New Jersey,* 384 U.S. 719. The *Escobedo* decision focused on the right to counsel under the Sixth Amendment in appraising in-custody confessions. This Sixth Amendment emphasis is in contrast to the reliance upon protection of the Fifth Amendment privilege against self incrimination in *Miranda* v. *Arizona,* 384 U.S. 436.

Most of the elements present in *Escobedo* were present in this case. When Sims' confessions occurred "the investigation [was] . . . no longer a general inquiry into an unsolved crime but ha[d] begun to focus on a particular suspect, the suspect ha[d] been taken into police custody, the police carr[ied] out a process of interrogations that lends itself to eliciting incriminating statements, . . . and the police have not effectively warned him of his absolute constitutional right to remain silent . . ." (378 U.S. at 490-491).

However, it could not be said on this record that Sims had "requested and been denied an opportunity to consult with his lawyer." Sims never requested a lawyer for he was incapable of understanding how a lawyer might help him, had no funds to hire a lawyer, was given no opportunity to consult with friends or family, or even to use a telephone, and was not informed of his right as an indigent to appointed counsel.

We submit that in these circumstances the general principle enunciated in *Escobedo* and in cases decided earlier

require the conclusion that Sims was denied the assistance of counsel in violation of the Sixth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Even before *Escobedo*, it had been recognized that the right to counsel might be violated by in-custody interrogation in the absence of counsel. The Ninth Circuit so held in *Griffith* v. *Rhay*, 282 F.2d 711 9th Cir. 1960), cert. den. 364 U.S. 941. The Ninth Circuit adopted the reasoning of *Crooker* v. *California*, 357 U.S. 433, 438-440, that apart from voluntariness interrogation in the absence of counsel might deny due process if any accused "is so prejudiced thereby as to infect his subsequent trial with an absence" of fundamental fairness, this is to be determined by all the circumstances including the education and mentality of the accused. The Ninth Circuit found Griffith's confession inadmissible despite a failure to request counsel. See also the opinion of Judge Browning in *Brubaker* v. *Dickson*, 310 F.2d 30 (9th Cir. 1962,) cert. den. 372 U.S. 978, generally in accord with *Griffith* v. *Rhay, supra.*

An additional point may be made with respect to Sims' confession to state investigator Cornelius on Monday, April 15. This took place after a warrant against Sims had been issued by a judicial officer. The warrant is not in the record and it cannot be determined on this record whether it was issued upon the basis of the prior confession (though this seems likely) or some other showing against Sims. In any event, at this stage Sims was, though not yet indicted, plainly in the position of an "accused" being held in anticipation of trial. See Ga. Code §27-209, quoted *supra* note 12. He still had no lawyer, but following his confession and the issuance of a warrant against him he was plainly accused and, for every relevant purpose, in a position exactly comparable to a man under indictment. He surely was in

need of a lawyer to prepare for the inevitable trial and to advise him.

The premise of *Spano* v. *New York,* 360 U.S. 315, 324-327 (concurring opinions) and *Massiah* v. *United States,* 377 U.S. 201, is that indictment marks the point in the criminal process when investigation is completed and trial preparation begins. At this point, "'when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Massiah* v. *United States,* 377 U.S. 201, 205.[16] Obviously, in the proceedings in petitioner's case the period following issuance of the warrant rather than that following indictment was the stage envisaged by this language. It should be noted that petitioner was formally indicted no earlier than a few days before trial on each of the two occasions on which he was tried.[17]

We submit that the principles of *Spano* v. *New York,* 360 U.S. 315, 324-327 (concurring opinions), and *Massiah* v. *United States,* 377 U.S. 201, require that this confession be excluded under the principles of the Sixth Amendment. To be sure, unlike Spano and Massiah, Sims had not yet been formally indicted at the time of the admission to Cornelius. But he was more than a suspect at this point. In every realistic sense he was "the accused" (Ga. Code §27-209) and was "scheduled to be tried" once the police had obtained his signed confession and a warrant against him. The subsequent interrogation by Cornelius was more

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[16] Quoting from *Powell* v. *Alabama,* 287 U.S. 45, 57.

[17] The exact dates of the first indictment and of commencement of the first trial are not in this record. But Sims was indicted at the October 1963 term and the date of sentencing October 9, 1963, appears (R. 251, 256). The second indictment was filed October 6, 1964 (R. 1); trial commenced October 7, 1964 (R. 46, 198, 249) and the verdict was returned October 8, 1964 (R. 2).

than an interrogation focusing on a suspect. Cornelius sought a final nail in the coffin which was already almost closed by the signed confession. This final confession closed the case, and after it effective aid and advice by counsel "at the only stage when legal aid and advice would help" (*Spano, supra,* 360 U.S. at 326) became impossible.

II.

Petitioner Was Denied Equal Protection of the Laws by Rulings of the Courts Below Refusing Evidence That Negroes Were Systematically Excluded From Grand and Petit Juries in Charlton County, and Overruling His Challenge to Those Juries on Grounds of Racial Discrimination in Their Selection.

Georgia's general procedure for selecting grand and petit jurors is as follows: The jury commissioners are directed by statute to examine the tax digest for the names of no more than two-fifths of the most intelligent and upright taxpayers. The names selected are put on tickets and placed in jury boxes, one for grand and one for petit juries, from which the judge later draws the names of those who are to serve for a particular term of court. The names drawn by the judge are placed on grand and petit jury lists (R. 76-80, 84, 86-87). See Ga. Code Ann. §§59-106, 59-108 (1965 Rev. Vol.).

Ga. Code §92-6307 provides that "Names of colored and white taxpayers shall be made out separately on the tax digest." Under local practice in Charlton County, where petitioner was tried and convicted, separate sections of the tax digest are maintained for white and Negro names, the whites listed on white paper, the Negroes on yellow paper (R. 82). The jury commissioners, all of whom are white (R. 83), rely upon their personal knowledge of the persons

listed in the tax digest and their personal opinions of those persons' character and intelligence, in selecting "upright and intelligent citizens to serve as jurors." Ga. Code Ann. §59-106. In practice, they first examine white taxpayers' names, then Negroes' names. Despite a commissioner's testimony that no consideration is given to race, the separate lists make it clear whether any particular taxpayer is white or Negro (R. 80-81, 84, 91-92).

The 1960 United States Census for Charlton County shows 2,656 persons over twenty-one, of whom 728 or 27.4% are non-white (R. 75). The tax digest books show 1,838 Charlton County taxpayers in 1961, of whom 367 or 19.9% are Negroes (R. 74), and 1,908 taxpayers in 1962, of whom 420 or 22% are Negroes (R. 74). There were 1,959 Charlton County taxpayers in 1963,[18] of whom 410 or 20.4% were Negroes (R. 74). Of the 99 jurors chosen by the judge for the October 1964 Term of the Charlton County Superior Court, from which the grand and petit jurors were selected in petitioner's case, only 5 or about 5% were identified as Negroes (R. 74, 89-90, 297-98).[19]

Petitioner offered to prove a consistent and continuing practice under which Negroes had been unconstitutionally barred from or selected in limited numbers for jury service in Charlton County (R. 3-4, 6-8, 11, 70-71). In support of this claim he proffered in evidence certified copies of the grand and petit jury boxes and lists for the period 1954-1963 (R. 72-73, 254-98), but the trial court ruled them inadmissible (R. 72-73, 147). This ruling was affirmed by the Georgia Supreme Court (R. 330-32).

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[18] No statistics regarding the number of taxpayers in 1964 were introduced apparently because such stastistics were not available at the time of trial (see R. 74).

[19] The names and racial identification of taxpayers selected for the 1964 jury boxes were not proffered at trial.

Petitioner makes three contentions here with regard to racial discrimination in jury selection: He first submits that the Georgia courts unconstitutionally refused to receive evidence proferred by him to show jury discrimination in years prior to his trial. This Court has often relied on evidence of jury discrimination going back as far as ten, twenty or thirty years and has held that one seeking to prove jury discrimination is entitled to offer evidence to support his claim (see Part A, *infra*, p. 49).

Petitioner also contends that the jury commissioners' use of segregated tax digests in selecting prospective jurors is unconstitutional. The segregated tax digests and the vague, subjective criteria for juror selection mandated by Ga. Code Ann. §59-106 encourage discriminatory use of the commissioners' discretion. (See Part B, *infra*, p. 52.)

Petitioner finally urges that a prima facie case of racial discrimination was made out by the fact that Negroes comprised 20% of the taxpayers but only 5% of the 1964 jury list. In support of this contention, petitioner will show that there is an extremely small probability that, assuming a fair selection process, so few Negroes would have appeared on the 1964 jury list (see Part C, *infra*, p. 56).

A. *The Georgia Courts Unconstitutionally Refused to Receive Petitioner's Proffered Proof of Racial Discrimination in the Selection of Jurors*

Petitioner offered to prove by certified jury boxes and lists covering the period 1954-1963 a pattern of arbitrary exclusion or limitation of Negroes on the jury lists of Charlton County. "Jury lists for a ten year period were offered in evidence. All were excluded except for the lists of jurors from which the juries who indicted and convicted were taken." Opinion of Georgia Supreme Court (R. 331). Petitioner also offered these lists to prove that the presence of a

Negro on the grand jury which reindicted petitioner following the reversal of his conviction in *Sims* v. *Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964), was the result of arbitrary inclusion on the 1964 jury list. These offers of proof were ruled inadmissible apparently on the ground that the grand and petit jury lists in the County had been revised during the summer of 1964, immediately prior to petitioner's reindictment and trial (R. 5, 8, 12, 70, 93, 95). The ruling was affirmed by the Georgia Supreme Court on the ground that no showing had been made of discrimination in the composition of the grand and petit juries involved in the instant case (R. 331).

It is a principle needing no elaboration that in a jury discrimination case, "... this Court must reverse on the ground that the defendant 'offered to introduce witnesses to prove the allegations ... and the [state trial] court declined to hear any evidence on the subject. ...'" *Coleman* v. *Alabama*, 377 U.S. 129, 133, quoting with approval, in a unanimous opinion, from *Carter* v. *Texas*, 177 U.S. 442, 448-49. With the notable exceptions of Coleman and Carter, this Court has consistently reviewed jury discrimination cases on a record covering a number of years. *E.g.*, *Neal* v. *Delaware*, 103 U.S. 370, 397 (no Negro had ever served as juror); *Norris* v. *Alabama*, 294 U.S. 587, 591 (no Negro had served within witnesses' memory); *Pierre* v. *Louisiana*, 306 U.S. 354, 361 (*ibid.*); *Smith* v. *Texas*, 311 U.S. 128, 129 (7 years); *Eubanks* v. *Louisiana*, 356 U.S. 584, 586 (18 years); *Hernandez* v. *Texas*, 347 U.S. 475, 482 (25 years); *Reece* v. *Georgia*, 350 U.S. 85, 87 (18 years); *Arnold* v. *North Carolina*, 376 U.S. 773, 774 (24 years); and see, *Rabinowitz* v. *United States*, No. 21256, 5th Cir., July 20, 1966. p.8 of slip opinion (more than 35 years); *Labat* v. *Bennett*, No. 22218, 5th Cir., August 15, 1966, p. 37 of slip opinion (8 years); *Brooks* v. *Beto*, No. 22809, 5th Cir., July 29, 1966, pp. 14-15

of slip opinion (no negro had ever served as grand juror); *Scott* v. *Walker*, 358 F.2d 561, 572 (5th Cir. 1966) (6 years); *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 63, n.5 (5th Cir. 1962) (11 years); *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 78 (5th Cir. 1959) (no Negro had served within witnesses' memory).

Notwithstanding this substantial body of precedent, establishing beyond peradventure the pertinency of a pattern or practice of past discrimination as a basis for interpreting the significance of the composition of particular juries in the case at issue, the state trial court refused to permit petitioner to examine a jury commissioner regarding the number of Negroes in a petit jury box compiled just *two years* prior to trial.

> The Solicitor General: Your Honor, we will make our objection . . . as to going into a [1962] jury list that doesn't have anything to do with the present grand jury or petit jury. . . . We say under the law he [petitioner] is entitled to a cross section of petit jurors and grand jurors, but that could only pertain to this petit jury and this grand jury—not some that used to be.
>
> The Court: I am of the opinion that would be right (R. 88-89).

Petitioner was thus thwarted in his attempt to make a full record upon which a continuing pattern or practice of racial discrimination in jury selection in Charlton County might have been based. His contention of *systematic* exclusion or limitation of prospective Negro jurors in selection of his grand and petit juries was thus deprived of the evidentiary support which derives from placing present practices in the meaningful context of past actions. As this Court has recognized, "Institutions,

like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known." *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 69. Petitioner seeks nothing more than to have his day in court on his federal constitutional claims. This he has been denied, and with it the equal protection of the laws.

B. *The Use of Tax Digests Containing Racial Designations, As Required by Statute, in Georgia's System of Jury Selection is Unconstitutional.*

This Court has long made clear that "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell* v. *Texas,* 339 U.S. 282, 286. Petitioner contends that the jury selection procedures established by state law and used in Charlton County, Georgia, encourage and permit the selection of jurors on the basis of race, in violation of the Fourteenth Amendment.

In Charlton County grand and petit jury lists are selected by a jury commission of white commissioners. At the time of petitioner's trial only two-fifths of the most intelligent, upright and experienced citizens on the tax books were eligible to be jurors pursuant to Ga. Code Ann. §59-106. The jury commissioners checked the tax books to determine who was qualified for jury service. In accordance with local practice under Ga. Code §92-6307, which requires that the tax books separately list white and Negro taxpayers, white taypayers were listed on white paper and Negro taxpayers separately on yellow paper.

At the time they select persons from the tax digest, therefore, the jury commissioners have actual knowledge

of the race of each taxpayer.[20] Except for specifying the *maximum* number of persons who may be selected, i.e., two-fifths of the whole number of taxpayers, Ga. Code Ann. §59-106 gives no specific guidance to the commissioners. Rather, the statute requires the commissoiners to employ vague, subjective criteria: uprightness and intelligence. Such criteria, of course, allow broad discretion which may be exercised in a discriminatory manner. Cf. *United States* v. *Louisiana,* 225 F. Supp. 353, 396-97, *aff'd,* 380 U.S. 145; *United States* v. *Atkins,* 323 F.2d 733 (5th Cir. 1963), and cases there cited; *Rabinowitz* v. *United States,* No. 21256, 5th Cir., July 20, 1966, pp. 37-38 of slip opinion.

In the recent case of *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E.D. Va. 1964), *aff'd sub nom. Tancil* v. *Woolls,* 379 U.S. 19, a three-judge district court declared that Virginia statutes requiring that lists of voters and taxpayers be kept in separate books according to race violated the Fourteenth Amendment. The district court stated that it was now

> axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. Cf. *Anderson* v. *Martin,* 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed. 430 1964. The result of the statute or policy must not tend to separate individuals by reason of difference

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[20] Among the evidence proffered by petitioner but excluded by the trial court (R. 5, 8, 12, 70, 93, 95) were jury boxes clearly indicating the race of prospective jurors: The traverse or petit jury box for August 9, 1954, showed seven persons following 321 names, who were given special numbers, i.e., "1C through 7C" (R. 279) and the petit jury box for August 1, 1960, showed six persons, following 331 names, who were listed as "colored" (R. 288).

in race or color. No form of State discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth Amendment Freedom. 230 F. Supp. at 157-158.

And when used as the basis for jury selection, the discriminatory effect of segregated tax lists is far from "subtle." The vice of using such lists is two-fold under Charlton County practice. First, the jury commissioner has the means of willful racial discrimination ready to hand. Second, even if a commissioner wishes not to discriminate, he is nonetheless required to make a judgment as to the proportions in which white and Negro taxpayers shall be chosen for jury service. For it is only after considering the white list that the white jury commissioner turns to the Negro list; and under compulsion of the two-fifths statutory limitation upon the maximum number of persons to be chosen, he obviously must make the conscious decision at some point that there are enough whites and that Negroes shall now be selected. It will not do to say that this result is the inevitable product of a selection process that starts with tax lists that the State, for other legitimate reasons, may require to be kept in segregated form. For the precise holding of *Hamm* is that the State has no interests which justify the segregated lists and that they are unconstitutional in themselves. By refusing to give full weight to the *Hamm* decision and to this Court's affirmance of it, the Georgia Supreme Court, in a capital case, has permitted one unconstitutional practice to spawn a more vicious one.

The Georgia Supreme Court tried to minimize the significance of the racially segregated tax lists on the ground that the jury commissioners acted without regard to race (R. 330). But such protestations of good faith are not

in these circumstances sufficient. *Norris* v. *Alabama,* 294 U.S. 587. A selection procedure which provides unnecessary opportunities for discrimination violates the Fourteenth Amendment, whether or not those opportunities are proved to have been seized. In *Avery* v. *Georgia,* 345 U.S. 559, a conviction was reversed because the names of potential jurymen were placed on different colored slips according to race. The trial judge testified that he selected the slips without regard to color, but Chief Justice Vinson stated that "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process." *Id.* at 562. And Justice Frankfurter, concurring said: "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used." *Id.* at 564.

No significant distinction can be made between the selection process in *Avery* and the process used here. In *Avery* the jury commissioners selected prospective jurors for the jury list from the county tax returns.[11] The list was printed with the names of white persons on white tickets and the names of Negroes on yellow tickets. The tickets were then placed in a jury box from which a judge drew the names of those selected to serve on a given panel. A clerk arranged the drawn tickets and typed in final form the list of persons for a panel. 345 U.S. at 560-61. In petitioner's case, the jury commissioners chose prospective jurors from the tax digest having the names of white persons on white paper and the names of Negroes on

[11] These returns presumably were segregated because Ga. Code §92-6307, which is under attack here, was in effect when *Avery* was decided.

yellow paper. The names chosen were put into the jury box from which the superior court judge drew the names for a particular jury list or panel (R. 79, 86). Both in *Avery* and here the use of a procedure relying upon racial differentiation of prospective jurors denies equal protection. As this Court concluded in *Williams* v. *Georgia*, 349 U.S. 375, 382, "it was the system of selection and the resulting danger of abuse which was struck down in *Avery* and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists." That conclusion is no less applicable here. Cf. *Anderson* v. *Martin*, 375 U.S. 399.

C. *The Results of Jury Selection in the Instant Case Establish a Prima Facie Case of Racial Discrimination*

The principal evidence of racial discrimination in jury selection which petitioner was permitted to present below consisted of the facts that Negroes constituted approximately 20% of the Charlton County taxpayers in 1963, and only about 5% of the jury list from which the jurors were selected who indicted and convicted petitioner.[22] Notwithstanding the trial court's refusal to permit petitioner to make a full record regarding jury discrimination, it is respectfully submitted that this evidence alone established an unrebutted prima facie case of racial discrimination.

It is well settled that a showing of the total exclusion of Negroes from jury lists in jurisdictions where they con-

[22] The only jury commissioner who testified stated that the commissioners only selected persons whom the commissioners knew (R. 78) and that he could only identify 5 Negroes on the October, 1964 jury list (R. 89-90). Under ordinary rules for establishing a prima facie case, petitioner has thus elicited evidence tending to fix the number of Negroes on the list at five. If there were more, the other jury commissioners were available to the State to prove it. No attempt to present such proof was made here and petitioner submits that this record, therefore, establishes that there were but 5 Negroes on the list in question.

stitute a substantial percentage of the population makes out a prima facie case of discrimination. *Norris* v. *Alabama,* 294 U.S. 587. The reason is that it is extremely unlikely that a fair selection procedure would produce no Negroes on such lists where there is a substantial number of Negroes available for service. For the same reason, a significant disparity between the percentage of Negroes selected for jury lists and their percentage in the population from which the lists are drawn also makes a compelling showing of discrimination. Like cases of total exclusion of Negroes, the existence of a substantial disparity in representation is highly unlikely if the selection process has been a fair one. Cf. *Cassel* v. *Texas,* 339 U.S. 282, 289-90; *Brown* v. *Allen,* 344 U.S. 443, 471. A disparity exists in the instant case: Negroes comprise 20% of the taxpayers but only 5% of the October, 1964 jury list. The question, therefore, is whether this disparity is substantial enough to constitute a prima facie showing of racial discrimination.

The test of the significance of disparities is the probability that they would have occurred by chance. This is the implicit basis for the decision in *Norris* v. *Alabama,* 294 U.S. 587, and the other jury discrimination cases in which statistical evidence has been used. On occasion this Court has made this explicit. Thus, in *Smith* v. *Texas,* 311 U.S. 128, 131, the Court held that "Chance and accident alone could hardly have brought about for listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualification for jury service." Similar statements appear in *Hill* v. *Texas,* 316 U.S. 400, 404 and *Eubanks* v. *Louisiana,* 356 U.S. 584, 587. In these and other jury discrimination cases, this Court has defined the problem as that of determining the probability that, assuming the selection was made without regard to race, so few Negroes would have been chosen for jury service. When the probability is small that so few

Negroes would be chosen, the jury discrimination cases in substance hold it proper to reject the assumption that jury selections were made without regard to race.

The determination of these probabilities need not be left to the uncertain guide of common sense. There is a scientific method for solving problems of this type which has been widely used in many branches of science, economics, and social science. This is the mathematical method known as statistical decision theory. The application of this method to jury discrimination problems is fully discussed in an article to be published in the fall of 1966 in the Harvard Law Review. See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. (1966). In terms of statistical theory the issue before the Court is: What is the probability that no more than 5 Negroes would appear on a jury list of 99 when Negroes constituted 20% of the tax list from which the names of jurors were selected and the selection was made without regard to race?[23]

The answer is provided by an accepted mathematical formula, the derivation of which is discussed in detail in Finkelstein, *supra.* Applying that formula to the facts of this case: If a jury list of 99 is selected from a larger list which is 20% Negro, the probability that no more than 5 persons selected for the jury list would be Negro, if the selections were made without regard to race, is approxi-

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[23] Because the selection of names for the jury list was made in two stages—the white jury commissioners selected names from the tax digest for the jury boxes and the judge selected names from the boxes for the jury list—discrimination could have occurred at either stage. But since state officials were responsible for both selection processes, the jury was unconstitutionally chosen regardless of the official responsible for the discrimination. For this reason petitioner need only consider the result of the selection processes, i.e., the racial composition of the October 1964 jury list.

mately 0.00002. In other words, on only one occasion in 50,000, on the average, would a jury list selected at random under these conditions yield the observed results.[24] The probability of this occurrence is so minute that statisticians would uniformly reject the hypothesis that selection was made without regard to race. See *e.g.*, Hoel, INTRODUCTION TO MATHEMATICAL STATISTICS, 49 (1962).[25]

The probability of the result observed in this case is vastly smaller than the probability of the result observed in *Avery* v. *Georgia*, 345 U.S. 559, where this Court held that the statistical evidence made out a clear case of racial discrimination. The evidence in *Avery* showed that although Negroes comprised 5% of the jury list from which the venires were selected, no Negro had been selected for a venire of sixty.[26] This fact, together with the use of yellow slips for the names of Negro jurors—a method similar to the use of the segregated tax list in the instant case—

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[24] The requisite computations for this result are given in the Appendix.

[25] The only jury commissioner who testified stated that jurors were selected on the basis of being "intelligent, upright and good citizens" (R. 78). In order to sustain the state's contention that these factors rather than race accounted for the disparity between the number of Negroes on the tax list and those selected for the jury lists, it would be necessary to assume that on the average three to four times as many whites met these subjective qualifications than did Negroes. See *Finkelstein, supra*, where the method of analyzing the subjective qualifications issue is discussed. No evidence of any such superior rate of qualifications on the part of white taxpayers was introduced by the State nor is there any evidence that this small number of Negroes appearing on the jury list was the result of the application of the statutory criteria.

[26] Mr. Justice Reed, concurring, 345 U.S. at 563, gave the following statistics: "The population of Fulton County is 691,797. The Negroes comprise 25% or 165,814. The tax receiver's digest, from which the jury list is selected has 105,035 white citizens and 17,736 Negroes—14%. The jury list for the year in question had 20,509 white and 1,115 Negroes—5%. From that list a number, 150 to 200, were drawn for service on each of the divisions of the court. Evidently, these were for a week or a term's service. The venire from which the trial jury for Avery was selected numbered 60. All were white."

was held to make a *prima facie* case of discrimination. Mr. Justice Frankfurter, concurring, observed that "The mind of Justice, not merely its eyes, would have to be blind to attribute that occurrence to mere fortuity." 345 U.S. at 564.

The probability of the result observed in *Avery*, *i.e.*, that no Negroes would be selected for a venire of 60 where they comprise 5% of the jury list, was 0.046. This means that, on the average, venires without any Negroes would have appeared in *Avery* approximately five times in every 100. See Finkelstein, *supra*, for the computations. The probability that the venire in *Avery* was fairly chosen was approximately 20,000 times greater than the probability that the jury list in the instant case was fairly compiled.[27] Thus, although *Avery* involved total exclusion of Negroes from a particular venire and in the instant case some Negroes were included on the jury list, the probability that so few Negroes would be chosen in the instant case is vastly smaller than the probability that no Negroes would have been chosen in *Avery*.[28] If in *Avery* the results were suffi-

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[27] Finkelstein's article computes the 0.046 probability for *Avery* on the assumption that for the Avery majority the controlling disparity was that between the number of Negroes on the jury list (5%) and the number of Negroes (none) chosen for the venire in question (see n. 26, *supra*). It may be thought, however, that the Court rather was concerned with the fact that Negroes comprised 14% of the tax rolls yet none were called for service. Applying the same formula used by Finkelstein to compute the figure 0.046 but considering the tax rolls as the relevant universe from which the venire was drawn in *Avery*, the probability that no Negroes would be chosen for a venire of 60 is 0.000117. In other words, in only one chance out of 10,000, on the average, would a fair selection procedure yield the observed results in *Avery*. The probability of this occurrence is still approximately 5 times greater than the probability observed in the instant case.

[28] There are two reasons for this. The first is that in the instant case Negroes comprised 20% of the taxpayers from which the jury list was selected, while in *Avery* they comprised only 5% of the jury list from which the venire in question was chosen. The larger the proportion of Negroes in the universe from which selections are made, the smaller the

ciently improbable to constitute a prima facie case of discrimination, the evidence here must amply sustain petitioner's burden of proof.[39]

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

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probability that only a few Negroes would be chosen. The second reason is that the group selected in the instant case (99 on the jury list) was substantially larger than the group in *Avery* (60 on the venire). The larger the group considered, the smaller the probability of a substantial disparity in racial proportions.

[39] *Swain* v. *Alabama*, 380 U.S. 202 is not authority for a contrary result. Statistical computations of the type given above were not presented to the Court and *Swain* did not involve the use of a segregated tax digest in the selection of jurors. See Finkelstein, *supra*, for an analysis of *Swain*.

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APPENDIX ON COMPUTATION

The probability that no more than five Negroes would be selected out of 99 when Negroes constituted 20% of the tax list from which the selections were made may be computed by using a formula known as the cumulative binomial distribution. The value of this formula can be determined either by using ready-made tables or approximation methods. We have used the table appearing in Harvard Computation Laboratory, *Tables of the Cumulative Binomial Probability Distribution* (1955). Using that table we have the following for the probability P that no more than five Negroes would be selected:

$$P(v \leq 5) = \sum_{v=0}^{v=5} \frac{n!}{v!(n-v)!} P^v Q^{n-v}$$

$$= \sum_{v=0}^{v=5} \frac{99!}{v!(99-v)!} (0.20)^v (0.80)^{99-v}$$

$$= 0.00002+$$

A description of the derivation and terms of the formula and the use of the tables appears in Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. ..... (1966). [To be published in the Fall of 1966.]